

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 5, 1997

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 95-459
Petitioner	:	A. C. No. 01-01401-04102
22.	:	
	:	No. 7 Mine
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Fauver

This is a civil penalty case under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. The Commission has vacated the judge's civil penalty assessment and remanded for reassessment.

The Commission's decision expresses concern that the judge may have Aconsidered deterrence as a separate factor in his analysis.@ Slip opinion, p. 4.

The Commission has held that Aa judge may not go beyond the six criteria set forth in section 110(i)@and that ADeterrence is not a separate component used to adjust a civil penalty amount after the statutory criteria have been considered.@ Id., quoting the Commission's decision in Ambrosia Coal & Constr. Co., 18 FMSHRC 1552, 1565 (1996), and Dolese Bros. Co., 16 FMSHRC 689, 695 (1994).

The Commission has also held that the penalty provision requires Aproper consideration of the statutory criteria and the deterrent purpose underlying the Act's assessment scheme@ (Sellersberg Stone Co., 5 FMSHRC 287, 2921-291 (1983) (emphasis added)).

In assessing a penalty, I have considered the six statutory factors, individually and as a whole, in relation to the deterrent purpose of the Act's penalty provision. I have not considered any other factor.

My consideration of the deterrent purpose of section 110(i) is not an added factor after weighing the six statutory factors. It is a fundamental and integral part of my evaluation of the six factors to determine an appropriate penalty. I believe a basic purpose in evaluating the six statutory factors is to consider the deterrence implications of each factor and the factors combined.

The reason that I find an integral relationship between deterrence and the six factors in

section 110(i) is that the underlying purpose of the penalty provision is to deter violations. As stated by the Supreme Court, a major objective of Congress was prevention of accidents and disasters; the deterrence provided by monetary sanctions is essential to that objective.[@] National Indep. Coal Operators' Ass'n v. Kleppe, 423 U.S. 388, 401 (1976) (emphasis added). As the D.C. Circuit stated in Coal Employment Project v. Dole, 889 F.2d 1127, 1133 (1989), ACongress was intent on assuring that the civil penalties provide an effective deterrent against all offenders, and particularly against offenders with records of past violations[@] (emphasis added); and as this Commission has stated, section 110(i) requires Aproper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme[@] (Sellersburg, supra; emphasis added).

The legislative history makes clear that Congress intended close consideration of deterrence in assessing civil penalties. For example, the Senate Committee Report on the 1977 Amendments states: ATo be successful in the objective of [inducing] effective and meaningful compliance, a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance.^{@1}

SPECIFIC FINDINGS ON THE SIX FACTORS IN SECTION 110(i)

Section 110(i) of the Act provides that, in assessing civil monetary penalties, the Commission shall consider:

[T]he operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation.

1. Operator's History of Violations

The findings and discussion as to this factor in my original decision are incorporated.

¹/ S. Rep. No. 181, 95th Cong., 1st Sess. 40-41 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Con., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 628-29 (1978).

2. Appropriateness of the Penalty to the Size of the Business of the Operator

Respondent is a large operator. The penalty assessed is appropriate to the size of Respondent's mining business.

3. Whether the Operator Was Negligent

The findings and discussion as to this factor in my original decision are incorporated.

4. Effect of Penalty on Operator's Ability To Continue in Business

The penalty assessed will have no effect on Respondent's ability to continue in business.

5. Gravity of the Violation

The findings and discussion as to this factor in my original decision are incorporated.

6. Demonstrated Good Faith of Operator To Achieve Rapid Compliance After Notification of the Violation

The findings and discussion as to this factor in my original decision are incorporated. I add the following: I find that the facts as to this factor are neutral. That is, they do not impact to lower or raise the amount of the penalty.

ASSESSMENT OF PENALTY

The six statutory factors demonstrate in this case the need for a strong penalty to achieve the deterrent purpose of section 110(i).

Respondent has a very poor compliance history. The instant violation and Respondent's history of violations of the same safety standard (section 75.400) demonstrate a repeated and serious disregard for the safety requirement to prevent combustible accumulations in an underground coal mine. Respondent had ample notice of its need to take greater measures to prevent violations of the standard, including many assessments of civil penalties for aggravated violations of section 75.400. Despite this, its violations of section 75.400 increased rather than decreased during the 2 years preceding the instant violation. From June 1993 to June 1994, Respondent was issued 123 citations and orders charging violations of section 75.400. The following year the number of charges increased to 168. At Mine No. 7, more than one out of five

of all orders and citations charged a violation of section 75.400.² Virtually all of the charges, for

²/ Government Exhibit 8-A supplements Exhibit 8 by adding Respondent's history of violations at all of its four mines in the 2 years preceding the instant violation. Respondent's section 75.400 violations represented about 20 percent of all orders and citations. At Mine No. 7, 23 percent of the citations and orders charged a violation of section 75.400. Virtually all of the charges resulted in a final disposition as violations. Government Exhibit 9 includes final orders that involved aggravated violations of section 75.400. A synopsis of several of these orders demonstrates the repetition of extensive-accumulation violations of section 75.400 despite

assessments of civil penalties for aggravated violations (civil penalties are taken from Govt. Exhibit 8):

<u>ORDER NUMBER</u>	<u>VIOLATION DATE</u>	<u>PENALTY PAID</u>
3187091	6/15/93	\$2,500

Coal accumulations on longwall belt for distance of approximately 1,000 feet. ASeventeen belt rollers were turning in coal.@ This belt line was recorded as Aneeding cleaned@ for a week.

3187215	7/28/93	\$3,000
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Coal dust had accumulated on entire length of 7,400 feet of belt line. AThis condition and or portions of this condition were reported in the belt book on 7-25, 7-26, 7-27-93.@"

3185386	3/22/94	\$4,500
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both years, resulted in a final disposition as violations.

Despite repeated government conferences, warnings, citations, orders and assessments of civil penalties for aggravated violations of section 75.400, Respondent committed the instant violation, which is another very serious, extensive-accumulation violation. The violation involves a high degree of gravity and aggravated conduct beyond ordinary negligence. The combustible accumulations were obvious, extensive, and dangerous -- particularly in the presence of extremely hot rollers and rubbing points creating friction between the belt and the steel belt structure.

In the posthearing brief, the Secretary described Respondent's record of violations of section 75.400 as "abysmal," and submitted that Respondent's record of "routinely disregard[ing] this standard" warranted "a substantial increase in the proposed assessment [of \$7,000] as the lone means of bringing about compliance at the No. 7 Mine" (Sec's Br. pp. 11, 18). The Secretary did not specify the higher amount of penalty considered appropriate to deter violations.

Considering the six statutory factors, discussed above and incorporated from my original decision, I find that a civil penalty of \$15,000 is appropriate to achieve the deterrent purpose of section 110(i).

Float coal dust had accumulated on belt line for distance of approximately 2200 feet. Bottom rollers turning in the loose coal.

3185633	4/12/94	\$5,500
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Coal accumulations up to two feet deep along a belt line. The belt was "approximately 1,500 feet long and every bottom roller on the belt was turning in coal or stuck with coal build up around it."

3183955	6/11/94	\$4,000
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Accumulations of up to 36 inches deep along a 1,800 feet belt line.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay a civil penalty of \$15,000 within 30 days of the date of this decision.

William Fauver
Administrative Law Judge

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